

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** January 18, 2021

**CASE:** 2020-00279R

**Citation:** Novak v. Peel Condominium Corporation No. 485, 2021 ONCAT 3

Order under section 1.44 of the *Condominium Act, 1998*.

**Member:** Michael H. Clifton, Vice-Chair

**The Applicant,**

Robert Novak

Self-Represented

**The Respondent,**

Peel Condominium Corporation No. 485

Represented by Larry Plener, Counsel

**Hearing:** Written Online Hearing – December 8, 2020 to January 14, 2021

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

[1] The foundation of this case concerns a policy of the Respondent set out in its By-law No. 5 that prohibits occupancy of the units in the condominium that is greater than “*two (2) persons per sleeping room or sleeping area*”. According to the by-law, where occupancy of a unit exceeds this threshold, the owner is subject to an assessment of additional common expenses that “*reasonably reflects the amount by which the contravention increases*” the costs of maintaining and repairing the common elements.

[2] The Applicant leased his unit to a couple who, at the time they commenced the lease, were childless. In 2016, the couple had a child who then resided with them in the unit. As a result, the Respondent’s board determined that occupancy of the unit exceeded the permitted threshold and imposed an assessment of additional common expenses in accordance with the by-law. The assessment amount was set at \$30 per month for each month of occupancy. The Applicant believes this assessment is unjustified and has requested records of the condominium in relation to this.

- [3] The reasonableness or validity of the by-law and the assessment are each outside of the jurisdiction of the Tribunal at this time, as are also all disputes between the parties relating to compliance, enforcement and collection of the assessment. The issues before the Tribunal in this case are restricted to the failure or refusal of the Respondent to provide certain of the records requested by the Applicant, and whether orders for the production of such records and/or a penalty are appropriate. Questions raised relating the adequacy of the Respondent's record keeping are also addressed in this decision.
- [4] The Applicant uploaded numerous documents, correspondence and video witness testimony at the commencement of Stage 3. Almost all of these materials, including the witness testimony, related solely to matters that are entirely outside of the Tribunal's jurisdiction in relation to this case. Only evidence that dealt with the issues that are identified above as being within the Tribunal's jurisdiction have been considered and treated as exhibits in this case.

## **B. BACKGROUND**

- [5] On or about July 14, 2020, the Applicant submitted a request for various core and non-core records of the corporation (the "Request"). On or about October 14, 2020, the Respondent's board provided its response to the Request (the "Response"), agreeing to provide the following requested records: the declaration, by-laws and rules of the condominium; its record of owners and mortgagees; Periodic Information Certificates from the 12-month period preceding the request; the budget for the then current year (2020); the then most recent approved financial statements and plan for future funding of the reserve fund; Mutual Use Agreements; the minutes of board meetings held within the 12-month period preceding the request. As those records were retained by the Respondent in paper format, rather than electronic, the Respondent affirmed it would make them available for the Applicant to retrieve at the onsite management office of the condominium.
- [6] The Response also indicated that the following four requested records would not be provided:
- a breakdown of the assessment for the increase in the cost of maintaining and repairing common elements on account of occupancy of the unit by the Applicant's tenant's child from infancy to the age of 4 (i.e., within the date range of January 1, 2016 to July 14, 2020), in relation to the occupancy fee charged by the Respondent on that account (the "Assessment Breakdown");
  - the minutes of board meetings from the period of January 1, 2001 to January 1, 2005 (the "2001-2005 Board Meeting Minutes");

- the minutes of owners' meetings from the period of January 1, 2001 to January 1, 2005 (the "2001-2005 Owners' Meeting Minutes"); and
- a breakdown of the costs that reasonably reflect the increased use of utilities forming part of the common expenses on account of the occupancy of the unit by the Applicant's tenant's child from infancy to the age of 4 (i.e., within the date range of January 1, 2016 to July 14, 2020), in relation to the occupancy fee charged by the Respondent on that account (the "Costs Breakdown").

These are the documents in dispute in this case. The Response stated that the requests for the Assessment Breakdown and Costs Breakdown were essentially duplicate requests and that the request should be satisfied by a review of the provisions of By-law No. 5. The Response also stated that the 2001-2005 Board Meeting Minutes and the 2001-2005 Owners' Meeting Minutes would not be provided since they do not exist.

### **C. ISSUES AND ANALYSIS**

- [7] In this section of the decision, I address the requests for the Assessment Breakdown and Costs Breakdown together, and the requests for the 2001-2005 Board Meeting Minutes and the 2001-2005 Owners' Meeting Minutes together. Under each heading, I also address all relevant issues – the failure or refusal to provide the records, the appropriateness of orders for production of the records and/or a penalty, and any questions relating to adequacy – without separate sub-headings.

#### **Meeting Minutes**

- [8] In his submissions, the Applicant describes board meeting minutes and owners' meeting minutes as core records. While this is a correct description of the minutes of meetings occurring during the year preceding the date of a request for records, minutes of meetings held in earlier years are non-core records. Regardless, owners are entitled to access both core and non-core records, if they exist. In this case, the Respondent states that neither the 2001-2005 Board Meeting Minutes nor the 2001-2005 Owners' Meeting Minutes exist.
- [9] The non-existence of such records constitutes a serious breach of section 55(1) of the *Condominium Act, 1998*, (the "Act"), which states, in part,

*The corporation shall keep adequate records, including the following records:*

...

*2. A minute book containing the minutes of owners' meetings and the minutes of board meetings.*

[10] The Respondent submitted that despite the requirement to make such records, it was under no requirement to retain them for longer than six years. The Respondent cited s. 55(2) of the Act, as it is currently written, which states,

*(2) In addition to satisfying the requirements of any taxing authority in Ontario, the government of Canada or any other jurisdiction to which the corporation is subject, the corporation shall retain the records mentioned in subsection (1) for the following periods of time:*

...

*2. For those records described in paragraphs 2 to 11 of subsection (1), the period of time that is prescribed.*

[11] For evidence of the time-period "*prescribed*" the Respondent referenced the website of the Canada Revenue Agency (CRA), which provides,

*Generally, you must keep all required records and supporting documents for a period of six years from the end of the last tax year they relate to.*

[12] The Respondent's argument is not correct. Not only does the CRA website likely refer only to the retention of financial records and their supporting documents for the purpose of assessing taxes, CRA policies and regulations are not what is meant to be referred to by the term "*prescribed*" in clause 2 of section 55(2) of the Act. Section 1(1) of the Act provides that where the term "*prescribed*" appears in the Act, it means "*prescribed by the regulations,*" which are further defined as "*the regulations made under this Act.*"

[13] Ontario Regulation 48/01 (the "Regulation") is a regulation made under the Act. In Section 13.1(2) of the Regulation it states,

*(2) Subject to subsections (3) and (4), the corporation shall retain the records described in subsection 55 (1) of the Act and subsection (1) of this section for the following periods of time:*

...

*2. For a record described in paragraph 2, 3 or 4 to 8 of subsection 55 (1) of the Act or paragraph 10 of subsection (1) of this section, at all times.*

It is clear from this that a condominium corporation is required to retain its minute book containing the minutes of owners' meetings and the minutes of board meetings "*at all times*" and not for only six years. (For clarity, subsections (3) and (4) of s. 13.1 do not diminish this requirement.)

[14] While I am aware that s. 13.1 of the Regulation only came into force in 2017, I am not persuaded that the Respondent is thereby relieved of a requirement or expectation to have retained the 2001-2005 Board Meeting Minutes and the 2001-2005 Owners' Meeting Minutes. For his part, the Applicant submits that the Respondent should be expected to have retained both sets of records "to meet a minimum standard of adequate record keeping," noting,

*Minutes of board meetings and owner's meetings are foundational records. ...Owners are clearly entitled to access them. These records provide corporate history and help ensure transparency and accountability around Board decision making and the general conduct of the business of the corporation. They are one of the ways owners are kept informed of important issues, confirm if by-laws have passed through by the owners, decisions, and the overall financial health of the corporation.*

I believe these statements reasonably explain why condominium corporations are expected to retain meeting minutes "at all times," and why a failure to do so falls short of the requirement in the Act for keeping adequate records.

[15] The Respondent seeks to further excuse itself for this failure by noting that none of the current directors were on the Respondent's board prior to 2008, that the current condominium manager has served the Respondent since only 2010, and that the prior manager has not responded to their inquiries regarding such records. I do not believe these facts excuse the Respondent from a finding that it has failed to keep adequate records, and the Respondent is strongly advised to take whatever additional steps it can to locate such minutes (copies of which might be in the possession of former board members or even some other owners in the condominium who were present during the relevant periods as well) if at all possible and regardless of any request for records. However, a condominium corporation cannot be expected to provide records that do not exist, and it is evident that the Respondent tried to locate these records and only failed to provide them to the Applicant because those efforts proved unsuccessful. Therefore, I do not find that in this case the Respondent has unreasonably refused to provide the 2001-2005 Board Meeting Minutes and the 2001-2005 Owners' Meeting Minutes.

### **The Breakdowns**

[16] Regarding the Assessment Breakdown and Costs Breakdown, the Applicant seeks these records in order to better understand the data and analysis relied on by the Respondent when setting the extra occupancy assessment amount, chargeable under its By-law No. 5, at \$30 per month. The by-law states that the amount should "reasonably reflect" the amount that the extra occupancy of the unit

increases the repair and utility costs of the condominium. The Applicant wants to know whether the assessment satisfies the requirements of the by-law. As noted, however, we cannot deal with that issue in this hearing. Instead, we can only deal with whether the Respondent's response to the Request satisfies the requirements of the legislation.

[17] Regarding the Assessment Breakdown, the Response states,

*The Board has determined that you may not examine or obtain a copy of this record, for the following reasons: Please see By-law #5 already requested and will be provided in this package.*

In regard to the request for the Costs Breakdown, it states that this is a "Duplicated Request" and again refers to the Applicant to By-law No. 5.

[18] The relevant provisions of By-law No. 5 are contained in its article 10.2, which reads as follows:

*10.2 Occupancy*

*(a) The Corporation hereby adopts as the maximum occupancy for each unit, the occupancy load determination in the Ontario Building Code as prescribed in O. Reg. 403/97, being two (2) persons per sleeping room or sleeping area in a dwelling unit; and*

*(b) Any owner who contravenes the maximum occupancy may be subject to:*

*(i) An assessment for an amount that reasonably reflects the amount by which the contravention increases the cost of maintaining the common elements and repairing them after damage as determined by the resolution of the Board of Directors; and*

*(ii) An assessment for an amount that reasonably reflects the amount by which the contravention increases the cost of using utilities that form part of the common expenses as determined by the resolution of the Board of Directors.*

[19] It is evident upon review of these provisions that they do anticipate that the Respondent's board will undertake some sort of analysis upon which the assessment under these provisions is based, and that the provisions themselves do not constitute or contain such an analysis or, more particularly, a breakdown of either the relevant costs or the assessment amount that might form part of that analysis. Therefore, the reference to By-law No. 5 in the Response is an insufficient answer to the Applicant's request. However, it remains a question whether those replies also constitute a refusal to provide the requested records, since it is not certain that such records even exist.

[20] The Applicant states that the above quoted provisions of By-law No. 5 require the Respondent to “*create an assessment that can explain to unit owners the breakdown of charging them an occupancy fee.*” The Respondent denies that it is under any such obligation. Whether or not the by-law imposes this requirement is beyond the scope of my jurisdiction to decide; but even if it does, this would not mean that the records necessarily exist. The Respondent asserts that they do not. The Applicant himself also submits that he has never seen such a document:

*I have never seen communication to the owners in any manner for many years that illustrate a basis of calculation for the Occupancy Surcharge or a Board Declaration of the Occupancy Surcharge pursuant to By Law #5 Article 10.2.*

Based on the evidence and submissions of the parties, I find no evidence for the suggestion that there are any records that match the description of the Assessment Breakdown and Costs Breakdown. Therefore, while the Respondent’s answer to such requests seems insufficient, if not defunctive, I, again, do not find that the Respondent has unreasonably refused to provide those records.

[21] I also note that, despite the foregoing, during these proceedings the Respondent’s counsel prepared and uploaded documents that purport to set out repair and utility expenses from the Respondent’s budget years, 2019 and 2020, and calculate a “*cost per occupant per month,*” in order to provide the Applicant “*with calculations justifying the amount*” of the assessment. In his submissions, the Applicant confirms having reviewed these documents. While the Applicant may not be satisfied with the analysis provided, and I cannot determine its accuracy, completeness, or reasonableness, it appears on the face of it to qualify as a breakdown of at least the costs that underlie the assessment amount and therefore approximates a positive response to and fulfillment of the Applicant’s request for such records.

#### **D. CONCLUSION**

[22] I find that the Respondent’s refusal to provide the Assessment Breakdown, the Costs Breakdown, the 2001-2005 Board Meeting Minutes, and the 2001-2005 Owners’ Meeting Minutes, was not unreasonable. Accordingly, there is no basis for imposing a penalty in this case. In addition, as such records appear not to exist, I cannot order their production. I encourage the Respondent to continue seeking its missing meeting minutes in order to maintain a more adequate set of records, but I do not make an order in this regard.

[23] Regarding costs, the Applicant has requested none. The Respondent’s counsel

admits to lacking certain knowledge of the Tribunal's "*tariffs or fee structure*" and notes the common practice in legal proceedings that costs would be awarded to a successful defendant or where it is found that a party brought its application for an improper motive. He indicates that his legal fees associated with this hearing are \$10,170 including HST. Under the Tribunal's rules of practice, costs may be awarded to a successful party; however, this does not include legal fees unless there are exceptional reasons for awarding them. In this case, I find none. As the Applicant was not successful, I make no order for costs in this case.

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Michael H. Clifton  
Vice-Chair, Condominium Authority Tribunal

Released on: January 18, 2021